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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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BUSINESS DEVELOPMENT SECTION  
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HUBERT H. HUMPHREY III  
ATTORNEY GENERAL

February 3, 1998

cc Dec-98-1

Magalie Salas  
Secretary,  
Federal Communications Commission  
1919 Mary Street, NW  
Washington, DC 20554

Re: In the Matter of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a),(b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way  
Docket No. CC-1-98

Dear Ms. Salas:

The State of Minnesota filed key portions of the contract which is the subject of the State's Petition for Declaratory Ruling. In the Petition, the State indicated that it would be happy to supply a complete copy of the contract to the Federal Communications Commission upon request. The State sent a complete copy of the contract to the Minnesota Telephone Association, along with a copy of the State's Petition, at the end of December, 1997. Since filing, the State has received several requests for portions or all of the contract from other interested parties. Other parties have received a copy of the entire contract excepting three lengthy attachments regarding State procedures that are required to be followed, or the specific portions, they have designated. As a result of these requests, the State has decided to file the entire contract with the Commission.

The contract is lengthy and it was the State's intent to help the Commission and other parties to focus on the key issues in question rather than making review more difficult by filing the entire agreement, complete with indemnification clauses. When we filed the Petition it was our belief that Exhibit 5 contained all of the relevant contract provisions. However, given the interest in the entire document, we wanted to assure that the Commission also possessed this information so that the debate can focus on the merits of the State's request and not the extent of disclosure that has occurred.

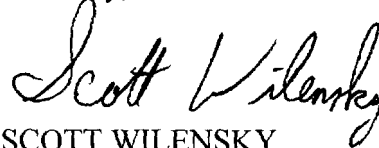
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Magalie Salas  
February 3, 1998  
Page 2

We apologize to you and to any interested parties for any inconvenience we may have caused.

Sincerely,

A handwritten signature in black ink that reads "Scott Wilensky". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

SCOTT WILENSKY  
Assistant Attorney General  
Residential and Small  
Business Utilities Division  
(612) 297-4609

cc: Carol Matthey, Common Carrier Policy Division  
cc: Richard Johnson, Attorney for Minnesota Telephone Association

AG:111468 v1



# STATE OF MINNESOTA

## OFFICE OF THE ATTORNEY GENERAL

**HUBERT H. HUMPHREY III**  
ATTORNEY GENERAL

February 3, 1998

BUSINESS REGULATION SECTION  
SUITE 1200  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2130  
TELEPHONE: (612) 296-9412

Carol Matthey  
Acting Chief of Common Carrier Policy Division  
Federal Communications Commission  
1919 Mary Street, NW  
Washington, DC 20554

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Carol Matthey  
February 3, 1998  
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SCOTT WILENSKY  
Assistant Attorney General  
Residential and Small  
Business Utilities Division  
(612) 297-4609

cc: Magalie Salas, Secretary, FCC  
cc: Richard Johnson, Attorney for Minnesota Telephone Association

AG:111524 v1

**AGREEMENT TO DEVELOP AND OPERATE  
COMMUNICATIONS FACILITIES**

**DATED**

12/23, 1997

RECEIVED

DEC 4 1998

**BY AND AMONG**

FOOTNOTES

**THE STATE OF MINNESOTA,**

**ACTING BY AND THROUGH**

**THE COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION**

**AND THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION**

**AND**

**ICS/UCN LLC,**

**A COLORADO LIMITED LIABILITY COMPANY,**

**AND**

**STONE & WEBSTER ENGINEERING CORPORATION,**

**A MASSACHUSETTS CORPORATION**

## TABLE OF CONTENTS

	<u>Page</u>
ARTICLE I. RECITALS.....	1
ARTICLE II. DEFINITIONS.....	1
ARTICLE III. GRANT OF RIGHTS; OBLIGATIONS; TERMS OF BARTER.....	1
3.1. Grant of Rights to Develop Network; Term .....	1
3.2. Obligations to Develop Network and Provide Services.....	3
3.3. Network Capacity and Services to be Provided to State.....	3
3.4. State Use of Network .....	11
ARTICLE IV. NETWORK PLANNING, REGULATORY APPROVALS AND PERMITS .....	1
4.1. Regulatory Approvals .....	1
4.2. Environmental Review and Approval.....	2
4.3. Permits .....	3
ARTICLE V. NETWORK DESIGN AND CONSTRUCTION.....	1
5.1. Network Architecture.....	1
5.2. Equipment Configuration.....	1
5.3. Design and Construction Standards .....	2
5.4. Design Implementation .....	4
5.5. Conditions to Commencement of Construction: Phase 1 .....	6
5.6. Conditions to Commencement of Construction: Phase 2 .....	9
5.7. Satisfaction, Benefit and Waiver of Conditions Precedent.....	10
5.8. Construction Implementation.....	11
5.9. Changes.....	13
5.10. State Major Changes.....	13

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
9.3. Obligation to Refrain from Discrimination.....	5
9.4. Disadvantaged Business Enterprise Utilization.....	5
9.5. Affirmative Action and Equal Employment Opportunity .....	5
9.6. Prevailing Wages .....	6
9.7. Professional Licensing.....	6
9.8. Drug-Free Project.....	6
ARTICLE X. SCHEDULE OF PERFORMANCE .....	1
10.1. Effect of Milestones.....	1
10.2. Make-up of Delays.....	1
10.3. Effect of Disputes on Schedule of Performance .....	1
10.4. Extension of Scheduled Performance .....	1
10.5. Schedule for TMC Fiber Optic Installations.....	3
10.6. Sequencing for Construction Segments .....	3
ARTICLE XI. RELATIONSHIP WITH TRANSPORTATION FACILITIES AND OTHER COMMUNICATIONS FACILITIES .....	1
11.1. Other Fiber Optic Systems.....	1
11.2. Relocations.....	3
11.3. Relationship with Intelligent Transportation Systems.....	4
11.4. Non-interference with Rights of Way Operations, Maintenance and Improvement .....	4
11.5. Utility Crossings .....	5
11.6. Access Over Non-State Properties.....	5
11.7. Right of Negotiation for Wireless Facilities .....	5

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
5.11 Optional Phase 1 Routes .....	14
5.12. Facilities for Collocating Customers .....	15
ARTICLE VI. NETWORK COMPLETION, TESTING AND ACCEPTANCE .....	1
6.1. Substantial Completion.....	1
6.2. Network Acceptance Test Plan .....	2
6.3. Testing.....	5
6.4. Network Acceptance .....	6
ARTICLE VII. OPERATIONS, ADMINISTRATION, MAINTENANCE AND REPLACEMENT .....	1
7.1. Company Responsibility .....	1
7.2. Performance Standards .....	1
7.3. O,A&M Plan.....	2
7.4. Entry onto Right of Way.....	4
7.5. Monitoring Performance.....	5
7.6. Renewal, Replacement and Technology Upgrades.....	5
7.7. Rate Structures and Publication .....	6
7.8. Affiliate Transactions.....	7
ARTICLE VIII. STATE OVERSIGHT AND COORDINATION .....	1
8.1. State Oversight and Coordination.....	1
8.2. Payment for Certain State Services.....	1
ARTICLE IX. CONTRACTING AND EMPLOYMENT PRACTICES .....	1
9.1. Key Contract Procurement; Key Contract Provisions; Key Contractor Qualifications.....	1
9.2. User Agreements.....	4



## TABLE OF CONTENTS (Continued)

	<u>Page</u>
ARTICLE XII. FINANCING AND RESERVES .....	1
12.1. Private Sector Financing .....	1
12.2. Reserve Accounts .....	1
12.3. Taxes .....	2
ARTICLE XIII. RELIANCE, INDEMNITY AND INSURANCE .....	1
13.1. Limitation on Company's Right to Rely .....	1
13.2. Indemnities From Company and S&W .....	2
13.3. State Waiver of Contribution .....	4
13.4. Defense and Indemnification Procedures .....	5
13.5. Insurance .....	8
13.6. Hazardous Substances .....	13
13.7. Survival .....	15
ARTICLE XIV. REPRESENTATIONS AND WARRANTIES .....	1
14.1. State Representations and Warranties .....	1
14.2. Company and S&W Representations and Warranties .....	1
14.3. Survival of Representations and Warranties .....	3
ARTICLE XV. TERMINATION .....	1
15.1. Termination for Public Convenience or Legislative Change .....	1
15.2. Other Unilateral Rights to Terminate .....	3
15.3. Termination Upon Expiration of Term .....	4
15.4. Title to Network; Disposition Upon Termination .....	4
15.5. Disposition of Collateral Agreements .....	6
15.6. Liability After Termination .....	7

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
15.7 S&W Unilateral Rights to Terminate Obligations.....	7
ARTICLE XVI. DEFAULT AND REMEDIES.....	1
16.1. Company or S&W Defaults.....	1
16.2. Cure Periods.....	2
16.3. State Remedies.....	2
16.4. State Default.....	7
16.5. Cure Periods.....	8
16.6. Company or S&W Remedies.....	8
16.7. Dispute Resolution.....	10
16.8. Limitations on S&W Liability.....	14
16.9. No Personal Liability.....	15
ARTICLE XVII. RECORDS, AUDITS, REPORTS AND INTELLECTUAL PROPERTY.....	1
17.1. Maintenance and Inspection of Records.....	1
17.2. Inspection and Audit.....	1
17.3. Public Data.....	2
17.4. Reporting Requirements.....	2
17.5. Powers and Duties of State Officials.....	5
17.6. Software Licensing.....	5
17.7. Rights of State on Termination.....	6
17.8. Intellectual Property Escrow.....	7
ARTICLE XVIII. LENDER RIGHTS AND REMEDIES.....	1
18.1. Security Instruments.....	1

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
18.2. Rights and Obligations of Lenders .....	3
18.3. Right of First Refusal and to Future Net Revenues .....	8
18.4. Cooperation.....	8
18.5. Estoppel Certificates .....	9
18.6. Participation in Proceedings. ....	10
18.7. No Surrender .....	10
ARTICLE XIX. ASSIGNMENT .....	1
19.1. Assignment by Company or S&W .....	1
19.2. Assignment by MnDOT or DOA.....	2
19.3. Notice and Assumption.....	2
19.4. Change of Name .....	2
ARTICLE XX. MISCELLANEOUS .....	1
20.1. No Gift or Dedication .....	1
20.2. Notices .....	1
20.3. Binding Effect.....	4
20.4. Relationship of Parties .....	4
20.5. No Additional-Party Beneficiaries.....	4
20.6. Time Limit for State Approvals.....	4
20.7. Waiver.....	4
20.8. Application of Laws and Regulations.....	5
20.9. Governing Law and Venue .....	5
20.10. Use of Police Power.....	5
20.11. Survival .....	5

## TABLE OF CONTENTS (Continued)

	<u>Page</u>
20.12. Construction and Interpretation of Agreement .....	6
20.13. Counterparts .....	7
20.14 Entire Agreement; Amendment .....	7
20.15. Acceptance by State .....	7

## EXHIBITS

- A - Network Architecture
- B - Design and Construction Standards
- C - Preliminary Performance Standards
- D - DBE Provisions
- E - Prevailing Wage Provisions
- F - Schedule of Performance and Liquidated Damages
- G - Schedule and Maps for TMC Buildout
- H. Utility Accommodation Policy

THIS AGREEMENT TO DEVELOP AND OPERATE COMMUNICATIONS FACILITIES is made and entered into as of Dec 23, 1997, among THE STATE OF MINNESOTA ("State"), acting by and through the Commissioner of the Department of Transportation ("MnDOT") and the Commissioner of the Department of Administration ("DOA"), ICS/UCN LLC a Colorado limited liability company ("Company") and STONE & WEBSTER ENGINEERING CORPORATION, a Massachusetts corporation ("S&W").

## ARTICLE I RECITALS

**Section 1.1** Pursuant to Article 14, Section 2 of the Constitution of the State of Minnesota, the State, acting by and through the authority vested in MnDOT, builds, operates and maintains trunk highways throughout the State for the benefit of the general public.

**Section 1.2** The authority of MnDOT to build, operate and maintain trunk highways throughout the State includes the authority under Minnesota Statutes 161.45 (1996) to accommodate utilities within the rights-of-way of trunk highways.

**Section 1.3** Historically, MnDOT has granted access permits for perpendicular utility crossings of all types of trunk highways, and access permits for longitudinal utilities only along trunk highways which are not freeways. Such access permits typically are subject to terms and conditions promoting and protecting the health, safety and welfare of users of such highways.

**Section 1.4** Historically, MnDOT has prohibited longitudinal access along freeways, consistent with policies and regulations in effect until 1989 of the Federal Highway Administration of the U. S. Department of Transportation ("FHWA") with respect to federal aid highways, with Minnesota Rules, Parts 8810.3300, subpart 4 (allowing access only in area, if any, between control-of-access line and right-of-way line) and with the pre-1989 policies of the American Association of State Highway and Transportation Officials ("AASHTO").

**Section 1.5** Because freeways generally operate at greater traveling speeds and higher volumes than other trunk highways, freeways demand different and more stringent design, maintenance and safety measures to protect the users thereof. These design and operational differences include, but are not limited to, fully controlled and less frequent interchanges, grade separations at interchanges, broader clear zones and recovery zones, other design elements to accommodate safe travel at higher speeds, more rigorous and higher cost maintenance schedules, differing traffic control plans, monitoring systems and traffic control methodologies, higher standards for emergency response, and greater restrictions on access to the right-of-way for ancillary purposes such as constructing and servicing utilities. These and other design and operational differences have been the basis and justification for the FHWA, MnDOT and AASHTO policies and regulations restricting the grant of longitudinal access permits for utilities along freeways.

**Section 1.6** In 1988 FHWA rescinded its regulations prohibiting longitudinal access along federal aid highways and delegated to the States the responsibility for adopting policies and regulations concerning this matter. Many states continue to prohibit such longitudinal access, although some states, such as the State of Ohio, permit the same subject to terms and conditions and other states, such as the State of Washington, have studied or are studying the feasibility of using such highways for telecommunications facilities.

**Section 1.7** Pursuant to FHWA requirements respecting federal aid highways, and in accordance with A Policy on the Accommodation of Utilities within Freeway Rights of Way (1989) published by AASHTO, in 1990 the State adopted its Procedures for Accommodation of Utilities on Highway Right of Way, dated July 27, 1990, Reference: Highway No. 90-1-P-1. Such Procedures continue the State's historic policy of granting access permits for perpendicular utility crossings of all types of trunk highways, and provide for the grant of permits for longitudinal placement of fiber optic cable along freeways subject to particular terms and conditions not generally applicable to perpendicular utility crossings of trunk highways.

**Section 1.8** To date the State has not granted any significant permit for longitudinal utility access along freeways, except for permits it granted for the laying of fiber optic cable pursuant to a special State statute enacted by Act of April 20, 1990, Ch. 426, H.F. No 1857, sec. 7 (the "Special Statute"), which states:

"Notwithstanding Minnesota Rules 1989, part 8810.3300, subpart 4, a Utility, as defined in Minnesota Rules 1989, part 8810.3100, subpart 4, may lay a fiber optic cable or a conduit containing one or more fiber optic cables inside the control-of-access lines along the portion of the interstate highway designated as I-94 that runs between Maple Grove in Hennepin County and St. Cloud in Stearns County, and the portion of the interstate highway designated as I-494 that runs between Plymouth in Hennepin County and Maple Grove in Hennepin County;"

**Section 1.9** Based on its experience under the Special Statute and experiences of other state departments of transportation, the State finds that under strictly controlled procedures the grant of access permits for a single or very limited number of installations of fiber optic cable and related facilities within the control of access lines of freeways throughout the State can be accomplished consistent with public health, safety and welfare, but that the grant of such permits to multiple parties will create undue risk to public health, safety and welfare, undue cost of monitoring, administration and maintenance to the State, undue risk of interference with the free flow of traffic, and undue delays and increases in costs to State to widen, relocate or otherwise alter or improve freeways.

**Section 1.10** Consistent with such finding and pursuant to MnDOT's authority, the State issued in February 1996 its Request For Proposal for Public-Private Partnership in the Development of Communications Infrastructure, together with all Exhibits, attachments, addenda and amendments thereto (collectively the "RFP"), under which the State sought proposals for the placement of either or both of a fiber optic network and wireless communications facilities longitudinally within the right of way of State trunk highways, including freeways, in exchange for communications services for the State and other governmental entities.

**Section 1.11** In response to the RFP, one or more entities submitted proposals for the design, construction, maintenance, repair and operation of a fiber optic network and/or wireless communications facilities.

**Section 1.12** On April 26, 1996, Company's member, International Communication Services, Inc. ("ICS"), as part of a team, responded to the RFP by submitting an initial proposal.

**Section 1.13** On June 7, 1996, ICS informed MnDOT that the team had been restructured to consist of ICS and S&W. MnDOT accepted the restructuring; and thereafter ICS and S&W made a timely oral presentation of their proposal and qualifications to MnDOT as part of MnDOT's procedures for evaluating responses to the RFP.

**Section 1.14** On August 14, 1996, the State selected ICS and S&W for the further negotiation of their proposal and the negotiation of a development agreement. The State made this selection based upon the selection criteria set forth in the RFP and its evaluation that the proposal of ICS and S&W was significantly more advantageous to the State than any other proposal received in response to the RFP.

**Section 1.15** The State has negotiated the proposal and this Agreement pursuant to MnDOT's express reservation of all rights available to it by law in administering the RFP, including but not limited to the right to negotiate with a proposer without being bound by any provision in its proposal. The State finds that the terms and conditions as finally negotiated pursuant to such reservation of rights, and as set forth in this Agreement, are within the scope of the RFP and remain significantly more advantageous to the State than those in any other proposal received in response to the RFP.

**Section 1.16** MnDOT selected the proposal of ICS and S&W and MnDOT and DOA have approved this Agreement based on an evaluation that such proposal and this Agreement will best serve the interests of the State in: (1) developing emerging intelligent transportation systems technology to improve efficiency, productivity and safe operation of trunk highways; and (2) enhancing and expanding the State's ability to secure affordable and reliable voice communications, data and video transport and other information transmission functions of importance to the smooth and efficient operation of State and other governmental agencies at disparate locations within the State, including but not limited to communications between and among MnDOT regional offices and operation of MnDOT's Traffic Management Center.

**Section 1.17** In addition to serving the primary public purposes described above, the State desires to serve the public purpose of increasing the fiber optic network available to the general public and increasing competition within the State for the transport of information by means of fiber optic cable, consistent with MnDOT's duty of protecting the health, safety and welfare of the public traveling on trunk highways.

**Section 1.18** In 1996 the United States enacted the Telecommunications Act of 1996, P. L. 104-104, 110 Stat. 70, Feb. 8, 1996). A primary purpose of such Act is to increase competition for the provision of telecommunications service by, among other things, removing barriers to entry into the business of providing telecommunications service.

**Section 1.19** Section 253 of such Act provides in part as follows:

“(a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

“(c) Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”

**Section 1.20** The State's selection of the proposal of ICS and S&W will promote the primary purpose of such Act and comply with Section 253 thereof because: (1) the State has selected such proposal as the result of a competitively neutral and nondiscriminatory RFP process; (2) the fiber optic network to be installed and operated will increase the fiber optic network available to the general public and increase competition within the State for the transport of information by means of fiber optic cable; (3) the limit under this Agreement on the State's right to authorize other fiber optic cable longitudinally along certain freeways is within the State's retained authority under such Act to manage trunk highways to preserve and protect the health, safety and welfare of the traveling public; (4) the fiber optic network Company and S&W will install will have ample capacity to meet foreseeable increasing demand for information transport; (5) if such fiber optic network has insufficient capacity to meet foreseeable demand after ten years of operations, the State has the right under this Agreement to authorize others to install additional fiber optic cable; (6) the Company is offering to other industry participants, including potential competitors, the opportunity to install fiber concurrently with Company's installation of its fiber optic network and the opportunity to obtain participatory interests in Company; and (7) the Company will make use of its fiber optic network available to similarly



situated parties on a uniform and nondiscriminatory basis, including uniform rates and charges, as more particularly provided in this Agreement.

**Section 1.21** In consideration of the benefits afforded by State to Company in this Agreement, Company is undertaking significant financial and economic obligations and risk in connection with the construction, ownership, management and operation of the Network.

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the State, Company and S&W agree as follows:

## **ARTICLE II DEFINITIONS**

Unless the context otherwise specifies or requires, for the purposes of this Agreement, the following terms shall have the meanings set forth in this Article II:

**Section 2.1 Acceptance.** The term "Acceptance" shall mean each acceptance by State of a Construction Segment of Phase 1 or a Construction Segment of Phase 2, in accordance with Section 6.4.

**Section 2.2 Acceptance Date.** The term "Acceptance Date" shall mean the date State executes and issues a notice of Acceptance confirming State's Acceptance of a Construction Segment of Phase 1 or a Construction Segment of Phase 2.

**Section 2.3 Acceptance Test Plan.** The term "Acceptance Test Plan" shall mean the approved plan for testing the Network described in Section 6.2.

**Section 2.4 Agreement.** The term "Agreement" shall mean this Agreement to Develop and Operate Communications Facilities and all exhibits and amendments hereto.

**Section 2.5 Agreement Date.** The term "Agreement Date" shall mean the date written on the cover page of this Agreement.

**Section 2.6 Change in Law.** The term "Change in Law" shall mean the enactment, adoption, promulgation, modification, repeal or other change in any Laws and Regulations that occurs after the Agreement Date.

**Section 2.7 Claimant.** The term "Claimant" shall mean any party making a Claim.

**Section 2.8 Claims.** The term "Claims" shall mean any and all claims, disputes, disagreements, causes of action, demands, suits, damages, injuries, liabilities, obligations, losses, costs and expenses arising under this Agreement, Permits, or the S&W Guaranty, or imposed by law.

**Section 2.9 Collocating Customers.** The term "Collocating Customers" shall mean all third parties:

- (a) which are not Company Related Parties and not affiliates of S&W (unless approved by State pursuant to Section 3.1(b)(ix));
- (b) which enter into User Agreements with Company in compliance with Section 9.2;
- (c) for which Company installs fiber optic cable and equipment that is separate and distinct from, collocated with, and installed concurrently with Company's installation of, the fiber optic cable and Equipment for the Network; and

(d) which will own such separate and distinct fiber optic cable and equipment after installation and operate it separately from the Network and Equipment.

**Section 2.10 Commencement of Construction.** The term "Commencement of Construction" shall mean the starting of substantial construction activities at any site location after State has notified Company and S&W that the prerequisite conditions in Section 5.5 or 5.6, as applicable, have been met, but only upon written notice to State and Company by S&W (as to Phase 1) or S&W or another construction contractor (as to Phase 2) that such substantial construction activities have commenced. In no event shall Commencement of Construction be deemed to have occurred, or be permitted, without such S&W or other contractor notice having been provided to State and Company.

**Section 2.11 Company.** The term "Company" shall mean ICS/UCN LLC, a Colorado limited liability company, and its successors and permitted assigns.

**Section 2.12 Company Default.** The term "Company Default" shall have the meaning set forth in Section 16.1.

**Section 2.13 Company Party.** The term "Company Party" shall mean and include Company and any member, director, officer, employee, agent, contractor (other than S&W), subcontractor (other than S&W) at any tier or other representative of Company.

**Section 2.14 Company Related Party.** The term "Company Related Party" shall mean:

- (a) any person or entity that owns, directly or through one or more intermediary entities, a 20% or greater membership, partnership or other equity interest in Company (each a "substantial owner"); or
- (b) any entity in which a substantial owner owns, directly or through one or more intermediary entities, a 20% or greater equity interest; or
- (c) any entity effectively controlled by or controlling Company or a substantial owner; or
- (d) senior management of Company or any substantial owner or members of the immediate family of any individual substantial owner or of such senior management.

**Section 2.15 Construction Segment.** The term "Construction Segment" shall mean each or any segment of the Network which Company and S&W designate and State approves pursuant to Section 5.8(c) for the purpose of scheduling construction.

**Section 2.16 Cutover Date.** The term "Cutover Date" shall mean each date that all telecommunications services for the State are transferred from existing facilities to any portion of the Network pursuant to Section 6.3(d).

**Section 2.17 Days.** The term "Days" shall mean calendar days, unless otherwise designated.

**Section 2.18 Design and Construction Claims.** The term "Design and Construction Claims" shall mean all Claims concerning (a) the content or approval of architectural design, Equipment configuration or Plans and Specifications; (b) claims of changed conditions; (c) the existence or interpretation of, or compliance with, the design standards set forth in Exhibit B and/or Laws and Regulations applicable to or affecting design; (d) whether Company's and S&W's construction complies with the approved architectural design, the approved applicable Equipment configuration, the applicable Plans and Specifications and changes thereto, the construction standards set forth in Exhibit B and applicable Laws and Regulations; (e) the Schedule of Performance set forth in Exhibit F, and Force Majeure, to the extent that either relates to the accomplishment of a design or construction milestone in the Schedule of Performance and (f) whether a requested change constitutes a State Major Change, or the schedule of performance or pricing respecting a proposed State Major Change.

**Section 2.19 DOA.** The term "DOA" shall mean the Minnesota Department of Administration, or any other state agency or department succeeding to the powers, authorities and responsibilities of such Department invoked by or under this Agreement.

**Section 2.20 Equipment.** The term "Equipment" shall mean all of the equipment installed by or on behalf of Company or S&W connected to and transmitting data over or receiving data from the fiber optic cable component of the Network, and all ancillary, peripheral and associated equipment installed by or on behalf of Company or S&W to operate or maintain telecommunications service in accordance with this Agreement. The Equipment includes but is not limited to all the equipment depicted with symbols on the maps attached to this Agreement as Exhibit A. The Equipment excludes any equipment owned by State or Collocating Customers.

**Section 2.21 Escrowed Material.** The term "Escrowed Material" shall mean all source code and source code documentation for software owned, controlled, purchased or licensed by Company for maintenance or operation of the Network, provided that Escrowed Material excludes source code and source code documentation for software not owned or controlled by Company where it is not commercially feasible for Company to obtain it.

**Section 2.22 FHWA.** The term "FHWA" shall mean the Federal Highway Administration of the U.S. Department of Transportation.

**Section 2.23 Fiscal Year.** The term "Fiscal Year" shall mean the consecutive 12-month period beginning July 1 and ending June 30 of the following calendar year.

**Section 2.24 Force Majeure.** The term "Force Majeure" shall mean circumstances or acts beyond the reasonable control of either party which arise from an intervening storm, tornado, hurricane, snowstorm, blizzard, ground freezing, severe cold or other severe weather but with respect to construction activities in the State only if occurring during the period of April 1 through November 1, act of God, fire, flood, earthquake, epidemic, explosion, volcanic eruption,

lightning, nuclear radiation, unknown, unforeseen or varying site conditions, contamination of soil or groundwater with Hazardous Substances, earth slides, quarantine restriction, labor strike, work stoppage or other labor disturbance, sabotage, freight embargo, fuel or energy shortage, unusual delay or accident in shipping or transportation of materials or equipment, riot or public discord, civil disturbance, war whether declared or undeclared, a declaration of a general banking moratorium by federal or Minnesota authorities or the general suspension of trading on the New York Stock Exchange due to financial crises, unreasonable State delay in processing reviews under this Agreement, State extensions of time to review Plans and Specifications beyond the 14-Day period set forth in Section 5.4(c), State requirements for changes to plans and specifications after they are approved, failure of a party to timely perform its obligations under this Agreement, State's wrongful damage to or destruction of Equipment or other property of Company or S&W, State's wrongful interference with Company's or S&W's performance of this Agreement, judicial compulsion, Regulatory Approval Delay or Change in Law (including Changes in Law affecting permit requirements), which the party seeking delay could not have reasonably anticipated or prevented and which has, or may reasonably be expected to have, a material adverse effect on the ability to timely perform an obligation of the party seeking delay, including but not limited to circumstances or acts which:

(a) cause material and unavoidable physical damage or destruction to the Network, including, without limitation, the Equipment; or

(b) materially delay the scheduled time of Commencement of Construction or completion of Phase 1 of the Network or Company's or S&W's performance of an act by a date certain agreed to herein; or

(c) materially interrupt the full and regular operation of all or any portion of the Network, including without limitation the Equipment.

**Section 2.25 Freeway.** The term "Freeway" shall mean any divided highway for through traffic with full control of access, and grade separated interchanges.

**Section 2.26 Hazardous Substances.** The term "Hazardous Substances" shall mean (a) any substance, product, waste or other material of any nature whatsoever which is or becomes listed, regulated, or addressed under any applicable Laws and Regulations in effect from time to time, (b) petroleum or crude oil or products thereof other than that contained within regularly operated motor vehicles, (c) asbestos and asbestos-containing materials, (d) radioactive wastes and substances and (e) any pollutant or contaminant as defined in Minn. Stat. §115B.02, subd. 13, as the same may be amended from time to time.

**Section 2.27 Incremental Cost.** The term "Incremental Cost" shall mean the differential in cost, including but not limited to the differential in the reasonably allocated wages, salaries, compensation and overhead of staff and employees, between designing and installing the Network or a portion thereof or undertaking certain other activities described herein without an addition or modification to the Network or a portion thereof and designing and installing the Network or a portion thereof or undertaking certain other activities described herein with the

addition or modification. By way of example, the Incremental Cost of adding strands of fiber to those already included in the Network design where the addition does not require redesign of or a larger cable or trench generally would include the extra cost of materials and the extra cost, if any, of wages, salaries, compensation and overhead over and above the cost of materials, wages, salaries, compensation and overhead already included in the Network design, but would not include costs of design, plowing, trenching or laying the Network.

**Section 2.28 Intellectual Property.** The term "Intellectual Property" shall mean the software, software documentation, source codes and source code documentation used in connection with the Network, and all data generated by or accumulated in connection with the testing or operation of the Network.

**Section 2.29 Intelligent Transportation System or ITS.** The term "Intelligent Transportation System" or "ITS" shall mean any application of computer, electronics or telecommunications systems, equipment or software and supporting fixtures and equipment which function to provide transportation and traffic data, information, services, safety enhancement or control to MnDOT, to any other operator or maintenance provider for State Trunk Highways or toll roads, or to the public traveling on State Trunk Highways or toll roads, including but not limited to (a) changeable message signs, (b) closed circuit television and video surveillance cameras and equipment, (c) Automatic Traffic Management Systems (ATMS), (d) Automatic Vehicle Identification systems (AVI), (e) Electronic Toll and Traffic Management (ETTM), (f) Automatic Vehicle Count Detection systems (AVC), (g) Advanced Traveler Information Systems (ATIS), (h) Roadway Weather Information Systems (RWIS) (i) Public Safety Communication Services (for any State, county, local or emergency medical service systems), (j) the TMC, (k) intermodal transportation systems, (l) in-vehicle technologies, (m) all items listed in the FHWA Intelligent Transportation Systems Summary Report dated January 19, 1995 and (n) any future systems or services conceived or developed for the same or similar purposes.

**Section 2.30 Key Contracts.** The term "Key Contract" shall mean individually any one, and the term "Key Contracts" shall mean more than one or all, collectively, of the following contracts, as approved by State in accordance with Section 9.1(a) hereto:

(a) the contract between Company and S&W for engineering, procurement and construction services;

(b) all other contracts or sub-contracts at any tier with any contractor or subcontractor, which contract or sub-contract gives primary responsibility for:

(i) project development or project management; or

(ii) determining architectural design, Equipment configuration or other design or selection of the major elements of the Network or Equipment; or

(iii) construction of the major elements of the Network or Equipment; or

- (iv) Equipment supply or installation; or
  - (v) operation, administration or maintenance of the Network or Equipment or any major element thereof; or
  - (vi) system integration, testing and/or acceptance; and
- (c) all material contracts with Lenders or underwriters relating to issuance of Project Debt.

**Section 2.31 Laws and Regulations.** The term "Laws and Regulations" shall mean all applicable laws, codes, ordinances, rules, restrictions, regulations and orders of the federal, State, regional or any local government (including those resulting from the initiative or referendum process) and judicial or administrative orders and decrees which are in effect as of the Agreement Date or any time thereafter during the Term, including without limitation (a) those relating to fire, safety, land use, health, labor, environmental protection, conservation, flood, traffic control, parking, zoning, building and access to Right of Way, (b) the Telecommunications Act of 1996 and all other laws relating to telecommunications by fiber optics and (c) all applicable rules, regulations and orders of the Minnesota Public Service Commission or the Federal Communications Commission.

**Section 2.32 Lender.** The term "Lender" shall mean (a) any person or entity which is the holder of a Security Instrument and its assignees, participating parties, trustees or agents, (b) a bank, trust company or similar entity appointed by Company to serve as trustee for owners of bonds or other Project Debt (including subordinate Project Debt) issued or incurred in connection with the Network, including any successor replacement trustees; or (c) any receiver or bond owners acting collectively consistent with the terms of the indenture authorizing issuance of bonds or other Project Debt (including subordinate Project Debt).

**Section 2.33 Maintenance Fund.** The term "Maintenance Fund" shall mean the fund by that name created pursuant to Section 12.2.

**Section 2.34 MEPA.** The term "MEPA" shall mean the Minnesota Environmental Policy Act, Minnesota Statutes, Chapter 116D, as it may be amended from time to time.

**Section 2.35 MnDOT.** The term "MnDOT" shall mean the Minnesota Department of Transportation, or any other state agency or department succeeding to the powers, authorities and responsibilities of such Department invoked by or under this Agreement.

**Section 2.36 MNet.** The term "MNet" shall mean the statewide telecommunications access routing system which provides voice, data, video and other telecommunications transmission services to:

- (a) State agencies;

(b) educational institutions, including public schools as defined in Minn. Stat. § 120.05, as the same may be amended from time to time, nonpublic, church or religious organization schools which provide instruction in compliance with Minn. Stat. §§ 120.101 to 120.102, as the same may be amended from time to time, and public and private colleges;

(c) public corporations as defined in Minn. Stat. § 300.02, Subd. 7 (e.g. World Trade Center; Minnesota Comprehensive Health Insurance Association, as distinguished from private corporations the stock of which is publicly traded); and

(d) state political subdivisions.

**Section 2.37 NEPA.** The term "NEPA" shall mean the National Environmental Policy Act, 42 U.S.C. Section 4321 et seq., as amended and as it may be amended from time to time.

**Section 2.38 Network.** The term "Network" shall mean the telecommunications systems and facilities designed, constructed and installed by Company and S&W in accordance with this Agreement, for use by State and others, including all component parts, such as but not limited to fiber optic cable, conduit and innerduct, the Nodes and the Equipment. The Network includes all the characteristics, components, locations and Equipment depicted and described in Exhibit A attached to this Agreement. The Network includes all the TMC and ITS work Company and S&W construct pursuant to Section 3.3(e), but excludes any other systems, facilities and equipment supplied or paid for by State or other users at customer locations, even though interconnected with the systems, facilities and equipment designed, constructed and installed by Company or S&W, such as but not limited to ITS (other than the Section 3.3(e) work) and Collocating Customer fiber cable and equipment.

**Section 2.39 Node.** The term "Node" shall mean each point along the Network at which fiber nodes are placed for existing or potential termination or interconnection Equipment. Nodes include but are not limited to those depicted on the maps attached to this Agreement as Exhibit A.

**Section 2.40 Non-Freeway Highway.** The term "Non-Freeway Highway" shall mean any State Trunk Highway other than a Freeway.

**Section 2.41 Notice of Claim.** The term "Notice of Claim" shall mean that document prepared by the Claimant in accordance with Section 16.7(b)(i).

**Section 2.42 O,A&M Plan.** The term "O,A&M Plan" shall mean the plan for operation, administration and maintenance of the Network prepared in accordance with Section 7.3.

**Section 2.43 Optional Phase 1 Route.** The term "Optional Phase 1 Route" shall mean each segment of the Network labeled in Exhibit A as an "Optional Phase 1 Route."



**Section 2.44 Oversight.** The term "Oversight" shall mean all those services and functions State has the right or obligation to perform or to cause to be performed under the Laws and Regulations, Permits or this Agreement.

**Section 2.45 Performance Standards.** The term "Performance Standards" shall mean the minimum standards and criteria for the performance and operation of the Network throughout the Term for the benefit of State, prepared and compiled in accordance with Section 7.2, and all modifications, supplements, refinements and clarifications thereof approved by State.

**Section 2.46 Permits.** The term "Permits" shall mean the permits required for utility work within Right of Way pursuant to the Utility Accommodation Policy, specifically being (a) Short Form No. 1723 entitled Application for Permit for Installation of Utility or for Placing of Obstructions on Trunk Highway, (b) Drainage Form 30795-03 entitled Application for Drainage Permit and (c) Long Form No. 2525 entitled Application for Utility Permit on Trunk Highway Right of Way, and any additions, substitutions or amendments to or for such permits hereafter required by amendment to the Utility Accommodation Policy.

**Section 2.47 Phase.** The term "Phase" shall mean each or one of Phase 1 or Phase 2.

**Section 2.48 Phase 1.** The term "Phase 1" shall mean the portion of the Network described as Phase 1 in Exhibit A attached to this Agreement. Phase 1 includes each Optional Phase 1 Route Company elects to construct pursuant to Section 5.11(a) or (b).

**Section 2.49 Phase 2.** The term "Phase 2" shall mean any and all fiber optic cable and related Equipment which is not within Phase 1 and which Company or a Company Related Party may at any time during the Term construct or install within the Right of Way of State Trunk Highways, regardless of whether Company or a third party owns the same, if and when such fiber optic cable is interconnected electronically with Phase 1 of the Network; provided that Phase 2 excludes any such fiber optic cable and related Equipment of or for a Company Related Party which (a) is constructed and placed in operation prior to, and not in contemplation of, the inception of the transaction by which a Company Related Party enters into its relation or affiliation with Company or (b) is constructed and placed in operation solely for the internal or retail use of the Company Related Party. Exhibit A attached to this Agreement contains a non-exclusive depiction of certain Phase 2 routes.

**Section 2.50 Plans and Specifications.** The term "Plans and Specifications" shall mean the plans, drawings and specifications for the construction and equipping of each Phase of the Network which (a) demonstrate compliance with State's design standards as set forth in Exhibit B and federal standards if applicable and (b) contain sufficient detail to permit construction and inspection of the Network and to ensure Oversight by State as provided in this Agreement.

**Section 2.51 Project Debt.** The term "Project Debt" shall mean indebtedness of Company: